Misjudging Judges

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Last year I attended four hearings at the Court of Justice (see here, here, here and here). Each time the topic was the independence of judges in Poland. Every time I also met judges from other Member States. Quiet and understated, taking days off from work, they came to show solidarity with their Polish colleagues. Their very presence underlined that what is at play is pan-European judicial independence. I counted my blessings that at least one pillar of the European rule of law showed up, stood firm and delivered: the judges. Thankfully, the Court of Justice continues to do its part too (see here for today's judgment on effective judicial review of the Polish law on the National Council of the Judiciary).

Judges alone cannot stop liberal democracy's decay. That is particularly so when there is a clear Member State level political agenda to destroy it. As rule of law backsliding continues, more and more often magistrates appeal for political help. Not just one, but 5231 of them from almost all EU Member States. On 10 December last year – indeed: international human rights day – they signed an urgent letter to the Commission. They stated that "systemic attacks on the rule of law, on independence of the courts are carried out in some countries, such as Hungary, Poland, Romania and Bulgaria", and asked the Commission – having "a key role" in the field of rule of law protection – for more infringement actions. They stressed that "any delay … poses a threat to national (and at the same time European) judges". They concluded: "We, the magistrates of the EU, appeal to the Commission to undertake further action aimed at observing Union Treaties (Article 17 TEU) and the execution of ECJ decisions (Article 260(2) TEU)".

Signs that the addressee of the magistrates' message did not adjudge it appropriately soon emerged. On 22 December 2020 a delegation of judges went to the Commission's headquarters. It found doors closed. The picture of them posing with a signed letter without anyone to hand it over to was (fore)telling. Commissioners like judicial independence as a soundbite, wax lyrically about its importance in speeches and non-binding exchanges, but keep away from comprehensive action even if 5000 European magistrates so ask. That is shameful. And it is also the opposite of what the full Commission had itself promised in open court just 11 months earlier, and even proudly announced in a press release: "We are guardians of the Treaties … we have the responsibility to give life to the Treaties with our daily work and our daily action".

Unbelievably, Commissioners Reynders and Jourová, in their reply to the judges' letter that transpired on 1 March managed to make matters considerably worse. About two pages long, the letter is quite the remarkable blend of bland generalisms, pedantic let-me-explain-to-you-what-you-yourself-live-through and legally and politically misleading statements. We read that magistrates should "be reassured of [the Commissioners'] determination to act for the protection of the [EU] values" and that the developments in the Polish judiciary are "constantly monitored". After

all, “Polish judges are European judges” and “should exercise their functions [independently] and without actions that bring a “chilling effect” on them and their activity”. The letter then spends about a page to list two infringement actions pre-dating the 10 December 2020 letter (and that therefore form the basis to ask for *more* action), the action against the muzzle law and the Supreme Court’s Disciplinary Chamber. The letter proudly mention the Court’s interim measures ruling of 8 April 2020 in C-791/19 R. See! The Commission acts!

The Commissioners then come to the meat of their reaction. “Not all the rule of law concerns can be pursued through infringement actions”. They refer to other tools, such the non-binding rule of law mechanism and rule of law report. In an apparent reference to the Union’s co-legislators, the Commissioners add that “we” also adopted the rule of law conditionality regulation. After all, “the rule of law … needs constant nurturing and joint action”: “there is no one single person or institution that can address all the concerns about rule of law and judicial independence in Poland”. Rest assured, however, “the Commission will continue to act to defend the rule of law … and will continue to follow closely the development in Poland”.

Let us consider this. There is no explanation of why at least six more issues in Poland alone, mentioned here by Pech, Wachowiec and Mazur, would be less well-suited for infringements. There is no explanation of why the Commission does not enforce the 8 April 2020 case it won, and why it thinks it is fine to wait for a ruling in Case 791/19 where the AG will deliver his Opinion only on 6 May 2021. The Commissioners did not mention either their own boss agreed to not enforce the rule of law conditionality regulation until its legality is cleared by the Court of Justice, likely not before 2022 (see here, point 2c). Never mind either that the rule of law dialogue brought up as a relevant tool instead of infringements is in fact a non-binding dialogue behind closed doors where most States don’t speak up (see here). And how striking that the Commissioners did not react to the fact that, apart from Poland, the judges’ letter also expressly referred to the need to act on judicial independence in Hungary, Romania and Bulgaria. Indeed, this non-reply boils down to what judges, under other circumstances, could easily consider contempt of court.

It would be infuriating, but at least understandable, if this were just a policy choice giving preferences to other issues. But the rule of law is not business as usual. What makes the Commission’s non-reply truly baffling above all is that it does not even serve what seems to be its own purpose – sidestep the too-hot-to-handle issue and get on with the political agenda. After all, how is the Commission going to sustainably achieve any of its *own* stated objectives – a digital single market, a green deal, a new migration policy – if what ends up written down after years of legislative wrangling cannot then truly function as law because some of the most important Union courts, national courts, are in the meantime partially populated by people who are no longer judges? It is truly spectacularly short-sighted and constitutionally illiterate to ignore this reality. Does really no-one inside the Berlaymont grasp this 1-0-1 reality? Perhaps Commissioners Jourová and Reynders need some leaning into from some focused colleagues responsible for substantive files, worried about *their* own legacies.

Do the Treaties contain alternatives to act if the Commission goes missing in action? They do. Other EU institutions and Member States have remedies to step in. The European Parliament, in a recent resolution, clearly stated it would consider an Article 265 TFEU action for failure to act if the Commission would not act to quickly invoke the rule of law conditionality regulation (here – point 9). Why wait for that, one wonders? Last November the Dutch Parliament's Second Chamber asked the Dutch government to investigate the possibility of acting to protect Polish judicial independence in the context of an inter-state complaint (Article 259 TFEU). The Dutch government replied in off-handed fashion on 1 February. It did acknowledge, though, that an interstate complaint "enters the picture in case the Commission, in a certain case, does not act or does not act sufficiently". The Commission needed just over two pages to make the case considerably stronger for why looking at these alternative options more closely is now necessary. In fact, with its call for "joint action" and its "no single institution"-talk it seems hardly in a position to refuse help.

The Commission's inexplicable non-reply to 5231 European magistrates makes for the saddest of days for the Union as a community of law. So let's be appropriately, straightforwardly lawyerly about it: at this stage the Commission's letter is inadmissible and invalid. After all, it is dated 26 March 2021, some four weeks into the future! For the benefit of the Commission, therefore, let us pretend this was an early draft, produced by a poor trainee, that somehow slipped through the bureaucratic nets ahead of time. Finetuning this draft, if for some inexplicable reason the judges' plight is not in and of itself is worthy of action, should at least take account of the Commission's own pledge in Luxembourg and concern for the substantive agenda it promised the European Parliament to deliver on. Whether it likes it or not, wishes it away or not, denies its legal nature or not, the Commission needs judicial independence. Everything it thinks, says or does is worthless in the real world without real judges being able to do their jobs. That should be the starting point of a real reply. (And, yes, 26 March 2021 is fine as a new deadline).
